**CHS Community Health Systems, Inc., d/b/a Mimbres Memorial Hospital and Nursing Home *and* United Steelworkers of America, District 12, Subdistrict 2, AFL–CIO, CLC.** Cases 28–CA–15948 and 28–CA–16291

August 1, 2002

## DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND COWEN

On August 2, 2000, Administrative Law Judge James L. Rose issued the attached decision. The General Counsel and the Respondent each filed exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

Contrary to our colleague, we find that the judge correctly dismissed the allegation that the Respondent, in March 1999, unlawfully changed its overtime policy from voluntary to mandatory. We assume arguendo that overtime had been voluntary and that the Respondent now said that overtime would be mandatory. After saying this, the Respondent offered to discuss the matter of overtime with the Union. It has not been shown that employees were actually forced to work overtime before the Respondent made this offer. As a result of these discussions, the Respondent, on April 29, issued a new memorandum regarding overtime. It is not alleged that this new memorandum was contrary to the agreement that was reached, and it is not alleged that this memorandum was a unilateral change.[3] On the contrary, the Union's concern appears to be that Respondent did not thereafter adhere to the memorandum. However, the General Counsel does not allege, as unlawful, any such nonadherence to the memorandum.

We recognize that, in general, an employer's offer to discuss a unilateral change with the Union after it is implemented will not be a defense to the unilateral change. However, in the instant case, the Respondent discussed the change with the Union before it was implemented, and an agreement was reached. In these circumstances, we see no warrant for the finding of a violation and we see no need for a remedial order. Accordingly, we affirm the judge's dismissal of this allegation.

We also disagree with our colleague's view that the Respondent unlawfully issued a new policy manual.

The dissent does not challenge the proposition that the mere creation of a manual is not itself a change in working conditions. Rather, the dissent seeks to show that Respondent *published* the manual to employees. In our view, the General Counsel has not established publication by Respondent. The only fact supporting such publication is that employee Sylvia Estrada saw the manual in the Respondent's obstetrics department and was told that it would be permissible for her and others to look through the manual or copy it. However, Estrada did not testify as to what action, if any, she took in response to what she was told. Nor did any other employee testify to having seen the manual or having been advised that it was permissible to look through it or copy it.[4] In these circumstances, we find that the evidence adduced on this point is insufficient to show that the manual was published. Thus, the General Counsel has failed to carry his burden of proof with respect to this allegation, which we therefore dismiss.

## ORDER

The National Labor Relations Board orders that the Respondent, CHS Community Health Systems, Inc., d/b/a Mimbres Memorial Hospital and Nursing Home, Deming, New Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[1] The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We agree with the judge's finding in sec. III,B,3 of his attached decision that the Respondent did not withdraw recognition of the Union as the bargaining representative of the unit employees. Consequently, we find that the judge's recommended general affirmative bargaining order in par. 2(b) of his recommended Order is not necessary to remedy the Respondent's unlawful unilateral changes in terms and conditions of employment and failure to provide the Union with certain requested information. We shall modify the judge's recommended Order accordingly. See, e.g. *Chelsea Place*, 336 NLRB 1050 (2001) (unilateral change in term and condition of employment, but no withdrawal of recognition; no bargaining order); *Eugene Iovine, Inc.*, 328 NLRB 294 (1999).

[3] The complaint alleges a unilateral charge in March, not April.

[4] Our colleague cites then-director of Human Resources Duffey's acknowledgement that the Respondent distributed new policy manuals before receiving the Union's letter requesting a copy. Duffey, however, did not say that these manuals were distributed to employees. This testimony is consistent with the likelihood that at least some of the Respondent's supervisors and officials had received copies of the manual, but that they had not been distributed to unit employees.

In sum, the General Counsel has not established distribution to employees.

(a) Refusing to bargain with the Union as the duly designated representative of its employees in appropriate bargaining units by making certain unilateral changes in terms and conditions of employment.

(b) Failing to furnish on request information necessary and relevant to the Union's duty as the employees' bargaining representative.

(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act.

(a) Upon request of the Union, rescind the unilateral changes found herein, including those set forth in General Counsel Exhibit 10 and the employee manual, to the extent that they were changes in terms and conditions of employment.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining units:

> Unit A: All service, maintenance and clerical employees employed by the Respondent, but excluding technical and all other positions as well as supervisory, managerial, and confidential employees as those terms are defined under the National Labor Relations Act and the National Labor Relations Board's rules and regulations.
>
> Unit B: All technical employees employed by the Respondent, but excluding service, maintenance, clerical, and all other employees as well as supervisory, managerial, and confidential employees as those terms are defined under the National Labor Relations Act and the National Labor Relations Board's rules and regulations.

(c) Provide the Union with a copy of the new policy manual, as requested by the Union on March 23, 2000.

(d) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1, 1999.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER LIEBMAN, dissenting in part.

I agree with the majority's affirmance of the judge's decision in all but two respects. Contrary to my colleagues, I would find that the Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally changed its overtime policy in March and April 1999, and when it issued a new policy manual in March 2000. In my view, the record here clearly supports finding both violations.

*The Overtime Policy*

> Paragraph 6(b) of the Consolidated Complaint alleges that "[I]n or about March 1999, the Union was put on notice for the first time, or otherwise acquired actual knowledge, that . . . the Respondent, by [Chief Nursing Officer] Karen O'Sullivan, changed its policy for the Units regarding overtime work."[1]

The judge found that it was difficult to tell whether the Respondent had a policy of voluntary overtime, which was changed to require mandatory overtime and if so, whether the Respondent made the change without notice to, and bargaining with, the Union. The judge found that the Respondent agreed to discuss the matter with Union representatives and agreed to some kind of overtime policy. However, he found that the record did not permit him to conclude that the Respondent had made a unilateral change. The judge erred by dismissing this allegation.

The record here establishes that (1) the Respondent unilaterally imposed a mandatory-overtime requirement; (2) rescinded that requirement after Union representatives objected and agreed to a new policy; but then (3)

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] The record establishes, and I would find, that the unilateral change from voluntary overtime to mandatory overtime and the Respondent's subsequent failure to adhere to the agreed-upon resolution of employee complaints about the changes (i.e., posted, rotating overtime) essentially were litigated as a single unilateral change.

unilaterally abandoned the agreed-upon policy and reimposed mandatory overtime.

Diana Lopez, a Certified Nursing Assistant (CNA) and employee member of the union's negotiating team, testified that, before March 1999, the Respondent's policy was that overtime for CNAs was voluntary. Lopez, whose testimony was neither contradicted nor discredited, recounted a brief discussion in March among Muggs Johnson (whom she identified as a shift supervisory nurse), Lopez, and 4 other CNAs.[2] Johnson told the others that the Respondent was short of help for the next shift and someone would have to stay overtime. Johnson stated that if no one volunteered, she would have one of them do mandatory overtime. Otherwise, Lopez and the other 4 CNAs would be written up or perhaps terminated. Lopez testified that the Respondent had never before made such a demand.[3]

Shortly after this meeting, Lopez told Garry Kavanaugh, the employee Union representative, that overtime had become mandatory.[4] Kavanaugh testified that he spoke to O'Sullivan about the issue and that she said "too many people were calling in sick so they had to make [overtime] mandatory." Soon afterward, Kavanaugh and Lopez met with Lynn Duffey, who was then the Respondent's director of human resources, scheduler Della Pacheco, and O'Sullivan to discuss the assignment of overtime. Kavanaugh suggested that overtime be assigned on a voluntary, rotating basis and that employees be given 2 weeks' advance notice. Kavanaugh, whose testimony on this point was also neither discredited nor contradicted, stated that Duffey and O'Sullivan agreed to this suggestion. When Lopez left the meeting, she understood that employees would have 2 weeks' advance notice of overtime, their work schedules would be noted accordingly, and overtime assignments would rotate among employees.

On April 29, O'Sullivan issued the following memorandum to all of the Respondent's Certified Nursing Assistants:

> On your schedule you will notice the letters "O.T." by your name on certain days. This is the rotation schedule for overtime, if needed. Della has scheduled to be fair to all. Please be sure you arrange baby sitters or other needed rides, etc. on those days. We have to maintain coverage at the Nursing Home and really need this coverage.

However, Kavanaugh and Lopez testified that by about 1 month after the meeting, the Respondent was no longer giving advance notice of overtime, was keeping the relevant list in a place inaccessible to the CNAs, and was choosing only certain CNAs for overtime work. Further, Kavanaugh testified that, before his March conversation with Lopez, the Respondent never offered him the opportunity to discuss the overtime issue. Similarly, Union staff representative Freddie Sanchez testified that the Respondent never contacted the Union for its input regarding the overtime policy.

In sum, the evidence is uncontradicted and sufficient to support the conclusion that the Respondent unilaterally changed its voluntary overtime policy to a mandatory one, and that it departed from its subsequent agreement to schedule overtime on a rotational basis, thereby violating Section 8(a)(5) and (1) of the Act.

### The Policy Manual

The General Counsel alleged that the Respondent unlawfully issued a new policy manual and implemented its provisions.[5] The Respondent admitted that it "issued" a new policy manual in January 2000. The judge found that the Respondent created the new manual and implemented its provisions, but that it did not "publish" the manual to employees. He distinguished between the creation of the manual and its publication, concluded that the creation of a policy manual is not a term or condition of employment, and dismissed this allegation. Even as-

[2] Lopez' testimony describing Johnson as a supervisor was never contradicted. Moreover, Johnson told the CNAs present that *she* would have one of the CNAs perform mandatory overtime and that the CNAs *would* be written up or terminated. Under the circumstances, it appears that Johnson was acting with at least apparent authority from the Respondent, whether or not she was actually a supervisor. See, e.g. *Mar-Jam Supply Co.*, 337 NLRB 337 (2001) (employer's operations manager was agent under Sec. 2(13) of Act, regardless of supervisory status under Sec. 2(11)). In any case, as shown below, O'Sullivan explained the reasons for compelling overtime to Kavanaugh, thereby confirming Lopez's report and effectively ratifying Johnson's actions.

[3] My colleagues assume that overtime had been voluntary, but state that there is no evidence that employees were actually forced to work overtime after Johnson spoke with Lopez and the other employees. While Lopez did not identify which employees worked on the next shift, it seems indisputable, given the threat of discipline and discharge, that any overtime worked cannot be regarded as voluntary.

[4] Kavanaugh was a de facto steward, if not an appointed one. He served on the Union's negotiating committee, employees brought their concerns about hours and terms and conditions of employment, including layoffs and discharges, to him, and managers met with him on several occasions to address the employees' concerns. In fact, at a subsequent negotiating session, when the Union accused the Respondent of unilaterally issuing the rotating overtime policy set forth below, the Respondent asserted that it had been negotiated when Duffey and O'Sullivan met with Kavanaugh.

[5] The consolidated complaint, pars. 6(f) and 6(g), alleges, that the Respondent "issued new policy manuals," and "implemented the policies contained in the manual . . . ." The complaint further alleges that the Union became aware of these acts in March 2000, but that the conduct itself occurred on dates unknown to the counsel for the General Counsel, but known to the Respondent.

suming that there is a legally-significant difference between issuance and implementation (or creation and promulgation), the judge clearly erred in finding that the manual was not published to employees.

The evidence in support of this alleged violation is conclusive. The Respondent admits that it issued the new policy manual in January 2000. Duffey acknowledged that in fact, the Respondent *distributed* new policy manuals prior to receiving the Union's March letter requesting a copy. The judge found that the manual contains significant changes in terms and conditions of employment, which the Respondent unilaterally implemented in violation of the Act.[6] The judge also found that the Respondent unlawfully refused to provide the Union with a copy of the new manual when requested to do so in March 2000. Against this backdrop, we should consider the unrefuted testimony of certified nursing assistant (CNA) Sylvia Estrada, who said that she first saw the manual in the obstetrics department in January 2000 "on the desk on the—where we had our wall unit with all the rest of the books." Lopez testified that Duffey and team leader Pam Baeza "told *us* to look through it and we could get copies, we were free to get copies." (Emphasis added.) She further testified that "[Baeza] just laid [the manual] down and said look at it, read it." Duffy and Baeza also told Estrada that employees could make or get photocopies of the manual.

Clearly then, the manual was *published* to employees, at least in obstetrics where Estrada worked, just as if it had been posted on a bulletin board or made available at a public library for borrowing, copying, or perusing. The fact that only one employee was questioned at the hearing about the manual's issuance is not determinative, nor is the fact that the Respondent did not distribute a copy to each employee. Her testimony, which is not contradicted, demonstrates that the manual was made available to employees with instructions to read it, and if desired, copy it. That is publication, and necessarily under the judge's logic, issuance.[7] Accordingly, I would reverse the judge and find that the Respondent violated Section 8(a)(5) and (1) by issuing the policy manual in January 2000.

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with the Union as the duly designated representative of our employees by unilaterally changing terms and conditions of employment.

WE WILL NOT refuse to furnish the Union with information necessary and relevant to its duties as the bargaining representative of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request of the Union, rescind all unilateral changes of terms and conditions of employment, including those contained in the employee manual issued in 2000.

WE WILL, before implementing any changes in your wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining units:

Unit A: All service, maintenance, and clerical employees employed by us, but excluding technical and all other positions as well as supervisory, managerial, and confidential employees as those terms are defined under the National Labor Relations Act and the National Labor Relations Board's rules and regulations.

Unit B: All technical employees employed by us, but excluding service, maintenance, clerical, and all other employees as well as supervisory, managerial, and confidential employees as those terms are defined under the National Labor Relations Act and the National Labor Relations Board's rules and regulations.

WE WILL provide the Union with a copy of the new policy manual, as requested by the Union on March 23, 2000.

[6] The new policy manual includes changes in job postings and transfers, attendance, drug screening, discipline and discharge, benefits, holidays, education assistance, summer leave, performance evaluations, overtime, and shift differential.

[7] In view of the evidence that the manual in fact was published to employees, I need not address whether issuance of the manual is inherent in implementation of its contents.

## CHS COMMUNITY HEALTH SYSTEMS, INC., d/b/a MIMBRES MEMORIAL HOSPITAL AND NURSING HOME

*Richard Smith* and *Jerome Schmidt, Esqs.*, for the General Counsel.
*Don T. Carmody, Esq.*, of Woodstock, New York, for the Respondent.
*Freddie Sanchez*, of Tucson, Arizona, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Deming, New Mexico, on May 2 and 3, 2000, upon the General Counsel's complaint which alleged that the Respondent made several unilateral changes in terms and conditions of employment, failed to furnish requested information to the Charging Party and withdrew recognition from the Charging Party, all in violation of Section 8(a)(5) of the National Labor Relations Act.

The Respondent generally denied that it committed any violations of the Act, that some allegations are barred by Section 10(b) and that the Charging Party lost its status as the representative of a majority of employees.

On the record as a whole[1] including my observation of the witnesses, briefs, and arguments of counsel, I hereby make the following

### I. JURISDICTION

The Respondent is a corporation engaged in the business of providing health care at an acute care hospital and nursing home in Deming, New Mexico. In the course and conduct of this business, the Respondent annually receives at its Deming, New Mexico facility, goods, products, and materials valued in excess of $50,000 directly from points outside the State of New Mexico. The Respondent admits, and I conclude that it is an employer engaged in interstate commerce within the meaning of Sections 2(2), 2(6), and 2(7) of the Act and is a health care institution within the meaning of Section 2(14).

### II. THE LABOR ORGANIZATION INVOLVED

United Steelworkers of America, District 12, Subdistrict 2, AFL–CIO, CLC (the Union), is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### *A. The Facts*

Until March 13, 1996, when the Respondent purchased this facility, the Mimbres Memorial Hospital and Nursing Center was owned and operated by Luna County, New Mexico. It is alleged, and admitted, that on July 18, 1995, the Union was certified by the Public Employees Labor Relations Board of New Mexico as the exclusive collective-bargaining representative in the following two units:

> UNIT INCLUDED: Service, maintenance, and clerical positions.
>
> UNIT EXCLUDED: Technical and all other positions as well as supervisory, managerial, confidential as those terms are defined under the Act and Board's rules and regulations.
>
> UNIT INCLUDED: Technical.
>
> UNIT EXCLUDED: Service, maintenance, clerical, and all others as well as supervisory, managerial, confidential as those terms are defined under the Act and Board's rules.[2]

First Luna County and then the Respondent, after March 13, 1996, engaged in negotiations with the Union for a collective-bargaining agreement and have dealt with the Union concerning grievance matters. To date no collective-bargaining agreement has been reached although the parties have had 15 to 20 bargaining sessions, the last occurring on September 8, 1999.

The complaint alleges that beginning in March 1999, the Respondent unilaterally changed terms and conditions of employment and thereby violated Section 8(a)(5) of the Act. While not really contesting the facts concerning these alleged unilateral changes, the Respondent denies it committed any unfair labor practices and contends that the Union in fact lost its status as the majority representative of the employees in the above-described units because: no employee has ever become a member of the Union (since the Union does not accept membership until a collective-bargaining agreement is reached); negotiations over a 4-year period has produced no agreement; there has been substantial employee turnover;[3] the Union has not communicated much with employees; and the employee

[1] Motions by the General Counsel and the Respondent to correct the transcript in certain respects are granted.

[2] These unit descriptions were designated unit A and unit B in the complaint and were grammatically altered, but not changed in substance. References to the "Act" and "Board" presumably mean the New Mexico labor relations act and board. Counsel for the Respondent conceded that unit B is appropriate but that unit A is not. Counsel for the General Counsel contends that even if such a unit description would not be the most appropriate, it is not inappropriate and is historical. Neither party briefed the issue of appropriateness of the units certified by the New Mexico Board. I conclude they are appropriate.

[3] This argument is assertedly based on documents the Respondent has yet to submit for inclusion in the record. Counsel for the General Counsel subpoenaed certain records which were not produced at the hearing but which counsel for the Respondent represented would be copied and submitted to the General Counsel forthwith. He requested that he be allowed to submit employee status reports for the years 1997, 1998, 1999, and 2000 posthearing. As of the date the Respondent's brief was mailed, those documents have not been produced for inspection by the General Counsel or submitted to me. Nevertheless, counsel for the Respondent moves that these documents be submitted and admitted into evidence at some future undisclosed date, to which counsel for the General Counsel objects. The Respondent's motion is denied. No persuasive reason has been offered why, in 2 months following the hearing, these documents have not been produced. On July 17, 2000, counsel for the Respondent wrote the associate chief administrative law judge that he had written counsel for the General Counsel asking that he reconsider his opposition. This letter adds nothing of substance to alter my ruling.

representative of the Union has dealt with the Respondent in the absence of union officials.

*B. Analysis and Concluding Findings*

1. Unilateral changes[4]

*a. Absences and sick leave policy*

On April 1, 1999,[5] Miriam Stevens, administrator, and Karen O'Sullivan, CNO, issued the following memorandum without first consulting with any representative of the Union:

> March 4, 1999. From this day on, ALL CNA's (certified nursing assistant[s]) who call in sick on week-ends and/or Holiday periods must either come to the Nursing Home for examination by the Nurse or bring a release to return to work from a physician or practitioner in order for the time lost to be an approved absence.
>
> In addition, when any CNA has excessive absences, he or she will be required to do the same procedure—either bring a physician's excuse or come to the Nursing Home for the absence to be approved. These staff members will be determined by the Charge Nurses with the approval of both the CNO and the Administrator.
>
> The employee must call in for him/herself—calls from a family member/other[s] are not acceptable and the absence will not be approved except in the case of a verifiable emergency.
>
> All sick calls must be made to the Nurse in charge.

This memo represented a change in policy, according to the undisputed testimony of Garry Kavanaugh (the Union's principal representative among employees). Lynn Duffey, the Director of Human Resources,[6] confirmed that the memo was published without consulting with the Union. Unquestionably, this memo represented a unilateral change in the policy for absences due to illness.

Similarly, on an unknown date, but apparently in October, Nancy Wright, the director of nursing, issued the following memo:

> EFFECTIVE IMMEDIATELY, ANY EMPLOYEE THAT CALLS OFF ON A SCHEDULED DAY OR WEEKEND WILL BE SCHEDULED ANOTHER DAY AND THE NEXT RESPECTIVE WEEKEND. FAILURE TO REPORT TO WORK ON THESE RESCHEDULED DAYS OR WEEKENDS WILL BE COUNTED AS AN UNEXCUSED ABSENCE AND CORRECTIVE ACTION WILL BE INITIATED.

I further conclude that manner in which one is allowed to seek approval for an absence due to illness is a term and condition of employment within the meaning of *NLRB v. Katz*, 369 U.S. 736 (1962). Accordingly, the Respondent violated Section 8(a)(5) of the Act, by announcing changes in the absence and sick leave policy.

*b. Change in overtime policy*

On April 29, O'Sullivan issued the following memorandum to all CNA's:

> On your schedule you will notice the letters "O.T." by your name on certain days. This is the rotation schedule for overtime, if needed. Della has scheduled to be fair to all. Please be sure you arrange baby sitters or other needed rides, etc. on those days. We have to maintain coverage at the Nursing Home and really need this coverage.

Kavanaugh testified, without contradiction or objection, that he was told by a certified nursing assistant that this represented a change in policy—that prior to March overtime had been on a voluntary basis.

Kavanaugh testified that he then went to O'Sullivan protesting this change and asking if overtime could be voluntary. She set up a meeting with him to discuss this matter, included in which were Duffey and Diana Lopez, a certified nursing assistant. At this meeting it was agreed that the possibility of working overtime was to be put on the schedule (which appears to be the essence of the memo). Kavanaugh testified that this policy did not work out, but he did not explain the particulars. Lopez testified that the agreed to policy lasted about 1 month, and then changed back. She testified, "They put it on one schedule and the next schedule they never put our overtime."

It is difficult to tell from Kavanaugh's testimony whether in fact the Respondent had an overtime policy which was changed to mandatory, or if this was the case, whether the Respondent did so without notice to and bargaining with the Union. It appears that the Respondent agreed to discuss this matter with representatives of the Union and that they agreed to some kind of an overtime policy. I cannot on this record conclude that the Respondent made a unilateral change in terms and conditions of overtime policy. I shall recommend that paragraph 6(b) be dismissed.

*c. Increased pay rate for new hires*

It is alleged that in August, the Union first learned that the Respondent increased the pay rate for new hires.[7] This allegation is based on the contention that some new hires were started at a wage rate higher than incumbents in the same classification. There is documentary evidence in support of this factual contention, however, it also appears that even before the Union was certified, the Respondent sometimes hired a new employee at a wage rate greater than an individual already working in the same classification.

For instance, records for 1996 show that Guadalupe Vega was hired as a CNA on October 13, 1994. As of 1996 she had a rate of $4.84 per hour, whereas Christine Udero was hired as a CNA on November 3, 1995, and in 1996 had a rate of $5.25. It is possible, but I conclude unlikely, that Udero was hired at the same rate as Vega and given an increase that Vega did not share. Thus, another document, styled "Union List" and dated

[4] At the hearing, counsel for the General Counsel withdrew par. 6(d) relating to a change in pay for lunch periods.

[5] All dates are in 1999, unless otherwise indicated.

[6] Duffy resigned 2 weeks prior to the hearing.

[7] In evidence is a "Wage Administration Scale" effective December 28, 1997, which was apparently promulgated unilaterally, but well before the 10(b) period here and in any event is not alleged violative of Sec. 8(a)(5).

August 11, 1999 gives the hire dates, classifications, and current rates of all represented employees. This shows that Patricia Hand was hired as a CNA on June 22, 1999, and had an hourly rate of $7, which is apparently her hire rate since her date of employment was less than 2 months before the date of the "Union List."

Kavanaugh testified that he first learned that new employees were being hired at greater rates than incumbents when x-ray technician Neidin Lucero, who was hired on March 24, 1997, and was being paid $13.71 per hour, complained that the Respondent hired a new x-ray technician at a higher rate. In fact, the records show that Monica Meza was hired on March 22, 1999, and was earning $15.48 (the maximum under the wage administration scale).

Kavanaugh went to Duffey with this complaint, and they had a 5-minute discussion, though he did not testify what, if any, resolution was reached. He did testify that during the tenure of Duffey's predecessor ("At least a year and a half ago, even longer.") he met with her and other management personnel and discussed grouping employees based on education, experience, licensing, and so forth. Though unclear from the record, this may have culminated in the wage administration scale of December 28, 1997, revised on October 27, 1999. This document sets the minimum, midpoint and maximum rates for the various job classifications.

While Kavanaugh did participate in discussions leading to the grouping of employees, he testified that the Union never agreed that new hires could be paid at rates greater than received by incumbent employees in the same classification. However, there is no contention that the pay rate given new hires exceeded the maximum under the wage scale or that the wage scale was itself created or revised in violation of the act.

Duffey confirmed that the Respondent sometimes hires new employees at greater rates than old employees. She testified that the chief financial officer told her that she should give new hires an additional two percent for each year of experience. She also gave additional pay based on other considerations, particularly where she had to do so to fill a job vacancy.

Though I conclude that in fact the Respondent sometimes hires new employees at rates greater than received by some old employees in the same classification, I disagree that this practice was a unilateral change in terms and conditions of employment. First, I question that it is a term of employment that new employees will not under any circumstances be hired at rates greater than those of current employees. But see, *Langston Co.*, 304 NLRB 1022, 1067 (1991) (respondent implemented its interim wage proposal prior to impasse and retained the right to pay new employees more than its current offer). Unlike *Langston*, there was here in effect a wage scale and the new hires were paid within it, albeit sometimes hired on at rates greater than the minimum.

Second, even if such is a term of employment, it is clear from the record that the Respondent has always engaged in such a practice. That Kavanaugh did not know of the practice, does not make what occurred in 1999 a unilateral change. I conclude that the Respondent's hiring practices did not change at any time within the Section 10(b) period (after January 29, 1999), and it did not violate the Act as alleged in paragraph 6(c).

*d. Policy on payment for training courses*

It is alleged that in mid-August, the Union first learned that the Respondent had changed its policy to pay for employee training and began requiring employees in the bargaining units to pay for CPR classes and other training courses.

This allegation is based on the testimony of Kavanaugh to the effect that in 1997 and 1998, he took training courses in cardiopulmonary resuscitation for which the Respondent paid. He testified, that he saw a notice on the bulletin board dated "November 3, 1998" that CPR training would cost employees $12. Kavanaugh testified that in November or December 1998, he told Sanchez about the Respondent's change in policy to require employees to pay for classes. However, he also testified that he first saw the notice in mid-August 1999, and that Sanchez first became involved with the Respondent's employees in May 1999. I discredit Kavanaugh's assertion that he first saw the notice in mid-August. It is simply incredulous that a notice would be posted for 9 months before Kavanaugh would see it. I find, as he also testified, that he saw it about the time it was posted and shortly thereafter notified some representative of the Union.

The notice is for an event which occurred well beyond the 10(b) period here, which I conclude the Union knew about at the time. I conclude that a finding concerning the Respondent's requiring employees to pay for training in November 1998 is barred by Section 10(b) and that paragraph 6(e) should be dismissed.

*e. Issuing a new policy manual*

It is alleged, and denied, that in March 2000, the Respondent issued a new policy manual. The Respondent agrees that a new manual was in fact issued in January. There is an issue of whether creating a policy manual (as distinguished from enforcing the employment policies therein) is a term or condition of employment. There is no evidence that the manual was in fact published to employees. To the contrary, in paragraph 7(a) it is alleged that the Union requested a copy of the manual and such was denied by the Respondent.

I conclude that the mere creation of a policy manual is not a term or condition of employment and therefore the Respondent did not violate Section 8(a)(5) by writing a new manual. Accordingly, I shall recommend that paragraph 6(f) be dismissed.

*f. Instituting policy changes*

It is alleged, and admitted, that the Respondent instituted policy changes set forth in the manual (a three-page summary of which is in evidence). There is no question that this was done without consultation or bargaining with the Union. Duffey so testified. Nor can there be any question that some of the policies, at least, pertain to terms and conditions of employment. Accordingly, I conclude that by unilaterally instituting the policy changes, the Respondent violated Section 8(a)(5) of the Act.

2. Request for information

In paragraph 7 of the consolidated complaint it is alleged on March 23, 2000, the Union requested a copy of the new policy manual, which was denied. Duffey affirmed both the request and the denial. Therefore, the only real question is whether the manual is necessary and relevant to the Union in representing bargaining unit employees. As I have concluded that manual contained changes pertaining to terms and conditions of employment, it is clearly necessary and relevant to the Union in order for it to perform its representative duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Accordingly, I conclude that by refusing to furnish the information, the Respondent violated Section 8(a)(5) of the Act.[8]

3. Withdrawal of recognition

It is alleged that on March 23, 2000, the Respondent withdrew recognition of the Union as the bargaining representative for unit employees. Although there are in evidence letters from Sanchez to the Respondent's counsel which went unanswered, there is no evidence that the Respondent in fact withdrew recognition.

Sanchez testified that he has never received notice that the Respondent was withdrawing recognition. When Sanchez specifically denied the factual basis of this allegation, counsel for the General Counsel sought to clarify the complaint by stating, "General Counsel is alleging as far as the withdrawal of recognition is that the actions by Respondent amounted to a constructive withdrawal of recognition of the union." I sustained the Respondent's objection to the extent that the General Counsel sought to amend the complaint from an allegation of actual withdrawal of recognition to a constructive withdrawal. On further clarification, counsel for the General Counsel argues that the unilateral changes imply withdrawal of recognition.

While I conclude that the Respondent did in fact fail in its duty to bargain in certain respects, the record is devoid of evidence that the Respondent withdrew recognition. I do not believe that committing such unfair labor practices as here necessarily implies withdrawal of recognition. I therefore conclude that the General Counsel failed to prove this allegation by a preponderance of the credible evidence, and I will recommend that paragraph 8 be dismissed.

[8] That the Union now has a copy, having received one during the hearing, is no defense to this allegation.

4. The loss of majority defense

In addition to its other defenses, the Respondent contends that the Union lost its status as the majority representative of unit employees, and therefore the refusal to bargain allegations should be dismissed. In support of this contention, the Respondent notes that no employee is a member of the Union, since the Union does not accept employees into membership until a collective-bargaining agreement has been reached; not very many employees went to a union meeting in the fall of 1999; and there has been a substantial turnover of employees (which I conclude has not been established by any facts, even assuming such is a relevant consideration). None of this tends to prove that any employee, much less a majority, has renounced the Union as his or her bargaining representative.

The General Counsel argues that the Board's policy of determining when, and under what circumstances, an employer can lawfully withdraw recognition, as set forth in *Celanese Corp. of America*, 95 NLRB 664 (1951), should be overruled. I conclude that whatever merit there may be in the General Counsel's argument, the posture of this case does not warrant reconsideration of the *Celanese* rules. The Respondent did not in fact withdraw recognition and offered insufficient objective evidence under the *Celanese* rules to support its contention that a majority of employees rejected the Union as their representative, assuming such would be relevant to finding the unfair labor practices here.

I conclude that there is insufficient evidence to rebut the presumption that the Union continues to be the designated bargaining representative of a majority of its employees in the appropriate bargaining units. I further conclude that the facts here do not excuse the Respondent from responsibility for the unfair labor practices found.

IV. REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act, including rescinding the unilateral changes found above and the employee manual issued in 2000 to the extent it contains changes in terms and conditions of employment.

[Recommended Order omitted from publication.]